

Comparing the Options for Association Coverage

The result is that DOL recognizes two different options for forming AHPs that qualify for federal recognition as large group ERISA plans. The Traditional Pathway has more stringent requirements for qualifying, while the New Pathway has more stringent operational requirements. In either case, because both types of AHPs are MEWAs, they must also comply with applicable state laws; DOL has made clear that the AHP Rule does not have preemptive effect.¹ Associations may also choose to operate outside either Pathway, either intentionally or because they fail to meet the applicable requirements. The three options are compared in the table below (for simplicity, it will be assumed that the association covers more than 50 employees in the aggregate, and that the members are all small employers or self-employed individuals):

	Traditional Pathway AHPs	New Pathway AHPs	Non-Plan MEWAs
Status under ERISA	Group health plan at MEWA level	Group health plan at MEWA level	MEWA not directly regulated under ERISA, but must file Form M-1 and may be subject to indirect regulation based on role in participating employers’ ERISA plans
Status under state law – fully insured	State may regulate insurer and insurance policy; AHP itself may only be regulated with regard to reserves and contributions	State may regulate insurer and insurance policy; AHP itself may only be regulated with regard to reserves and contributions	No restrictions other than HIPAA/ACA “federal floor”
Status under state law – not fully insured	State may regulate the plan as an insurer or may adopt a MEWA-specific law	State may regulate the plan as an insurer or may adopt a MEWA-specific law	No restrictions other than HIPAA/ACA “federal floor”
Coverage of self-employed individuals with no employees	May not participate in the group health plan.	If they meet the “working owner” time or earnings test	Subject to ACA individual market requirements
ACA market sector	Large group or self-insured plan	Large group or self-insured plan	“Look through” to member’s status as small group or individual

Control by members	Employer control of both the sponsor and the AHP must be present in form and substance	Employer control of both the sponsor and the AHP must be present in form and substance	Depends on state law
Commonality of interest	Must be based on common industry and meet “bona fide association” analysis; underwriting for health risk prohibited	May be based on common industry or common geography (state or metro area); underwriting for health risk prohibited	Depends on state law
Can insurance be its primary purpose?	No	Yes, but must have some other substantial business purpose; this can be demonstrated if association would still operate if it didn’t offer the AHP.	Depends on state law.
Experience rating at member level	Subject to state law, permitted unless a pretext for discriminating against a particular employer or individual	No	No
Other rating factors at member or participant level	Subject to state law, may use any non-health-status rating factor (including gender, occupation, and industry) unless a facially neutral criterion is used as a pretext for health status discrimination; ACA restrictions on age and geography do not apply.	Subject to state law, may use any non-health-status rating factor (including gender, occupation, and industry), unless a facially neutral criterion is used as a pretext for health status discrimination; ACA restrictions on age and geography do not apply.	Modified community rating as required under ACA individual and small group rules
Mandated benefits	Only as required by federal law for large employers and self-insured plans, or by applicable state law; EHB requirement does not apply	Only as required by federal law for large employers and self-insured plans, or by applicable state law; EHB requirement does not apply	EHB and applicable state law mandates